FILE COPY

MAR 2 193

CHARLES ELMORE CR

CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. [redacted]1

THOMAS M. LYNCH, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS,

vs.

THE PEOPLE OF THE STATE OF NEW YORK, UPON THE RELATION OF ELIZABETH PIERSON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

JOHN J. BENNETT, JR.,
Attorney General of the State of New York,

HENRY EPSTEIN,
Solicitor General of the State of New York,
Counsel for Petitioners.

JOSEPH M. MESNIG,
Assistant Attorney General of the State of New York,
Of Counsel.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari:	
Matter involved	1
Question presented	2
Statement of the case	2
Reasons relied on for allowance of writ	3
Brief in support of the petition:	
Opinions below	5
Jurisdiction	5
Statement of the case	6
Specification of errors	6
Summary of argument	7
Argument	7
Conclusion	22
Appendix	23

Cases Cited.

Baldwin v. Missouri, 281 U. S. 586	21
Beidler v. So. Carolina, 282 U. S. 1	21
Bromley v. McCaughn, 280 U. S. 124	19
Brushaber v. Union Pacific R. R., 240 U. S. 1	18
Clyde v. Gilchrist, 262 U. S. 94	8
Everards Breweries v. Day, 265 U. S. 545	22
First National Bank of Boston v. Maine, 284 U. S. 312	21
Farmers Loan Co. v. Minnesota, 280 U. S. 204	21
Lawrence v. State Tax Commission, 286 U. S. 276	11
Maguire v. Trefry, 253 U. S. 12	10
People ex rel. Central Union Trust Co. v. Wendell, 197 App. Div. 131	8
People ex rel. Stafford v. Travis, 231 N. Y. 339	14
Peck v. Lowe, 247 U. S. 165	13, 20
Pollock v. Farmers Loan & Trust Co., 158 U. S. 601	6, 14
Purity Extract Co. v. Lynch, 226 U. S. 192	22
Ruppert v. Caffey, 251 U. S. 264	22
Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83	11, 21
State ex rel. Bolens v. Frear, 148 Wisconsin, 456	16
State ex rel. Manitowoc Gas Co. v. Wisconsin Tax Commission, 161 Wis. 111	17
Shaffer v. Carter, 252 U. S. 37	9
Taft v. Bowers, 278 U. S. 470, 482	22
U. S. Glue Co. v. Oak Creek, 247 U. S. 321	14

Statutes Cited.

	Page
Act of February 13, 1925, c. 229, § 1, 43 Stat. 937	6
Act of February 13, 1925, c. 229, § 8, 43 Stat. 940	6
Section 351, New York Tax Law	7, 23
Section 357, New York Tax Law	8
Section 359, New York Tax Law	8

Miscellaneous

Cooley on Taxation, Fourth Ed., § 1743, Constitution of the United States	9
Constitution of the United States:	
Article I, § 9, cl. 5	13
Article I, § 8, subd. 3	14
Article I, § 9, subd. 5	14

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 831

THOMAS M. LYNCH, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS,

against

THE PEOPLE OF THE STATE OF NEW YORK, UPON THE RELATION OF ELIZABETH PIERSON.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, respectfully shows to this Honorable Court:

A.

Matter Involved.

The petition prays that a writ of certiorari issue to review an order and judgment of the Supreme Court of the State of New York entered December 9, 1933, upon an or-

der and judgment of the Court of Appeals of the State of New York, such Court being the Court of last resort in that State, unanimously affirming a final order of the Appellate Division of the Supreme Court, Third Department (R. 20-21).

B.

Question Presented.

Whether, under the Constitution of the United States, the State of New York can impose an income tax upon a resident of the State of New York, with respect to income derived from the rentals of real property situated in another state, owned by such New York resident.

C.

Statement of the Case.

The facts herein were not in dispute. The taxpayer at all times a resident of New York, owned certain real property situated in the State of Ohio. In the year 1928, the taxpayer received rentals therefrom in the amount of $2,233.72 (R. 14). She filed a resident income tax return for the calendar year 1928 but did not include such rentals as taxable income. The State Tax Commission ruled that they were taxable and served a notice of additional assessment of income tax. The taxpayer, after a hearing and final determination by the Commission, instituted a certiorari proceeding under the New York Tax Law, to review the action of the Commission, contending that the imposition of the tax was violative of the Fourteenth Amendment of the United States Constitution. The Appellate Division of the Supreme Court, Third Department, by a divided Court, held that the State was without

power to lay the tax (R. 18-21). On appeal, the final order of the Appellate Division was unanimously affirmed by the Court of Appeals.

D.

Reasons Relied on for the Allowance of the Writ.

1. There was here drawn into question the validity of § 351 of the New York Tax Law upon the ground that, as herein applied, such statute was repugnant to the Fourteenth Amendment of the United States Constitution.

2. The question here presented has not, it is believed, been decided by this Honorable Court.

3. The contention of the taxpayer herein is rested upon the decision of this Honorable Court in the case of *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, on rehearing 158 U. S. 601; we think the Courts below misapplied and misconstrued the scope and effect of that decision, and erred in applying the principles there decided to the instant case.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York, commanding that Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court in this case which was entitled in that Court: "The People of the State of New York upon the relation of Elizabeth Pierson, Relator, against Thomas M. Lynch, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, Respondents", to the end that said case may be reviewed and determined

by this Court, as provided by law, the order and judgment reversed, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

MARK GRAVES,
JOHN J. MERRILL,
JOHN P. HENNESSEY,
As Commissioners Constituting the State Tax Commission of the State of New York,
By JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,
HENRY EPSTEIN,
Solicitor General of the State of New York,
Counsel for Petitioners.
JOSEPH M. MESNIG,
Assistant Attorney-General of the State of New York,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 831

THOMAS M. LYNCH, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, PETITIONERS,

against

THE PEOPLE OF THE STATE OF NEW YORK, UPON THE RELATION OF ELIZABETH PIERSON.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion of the Appellate Division of the Supreme Court, Third Department (R. 18), is reported in 237 App. Div. 763.

The Court of Appeals wrote no opinion; the memorandum decision is reported in 263 N. Y. (mem.) 19.

II.

Jurisdiction.

The order and judgment of the Supreme Court herein sought to be reviewed was entered upon the order and judgment of the Court of Appeals of the State of New York, which is the highest Court in the State in which a decision in the suit could be had.

The order and judgment of the Court of Appeals was rendered in a cause wherein was drawn into question the validity of § 351 of the New York Tax Law upon the ground that, as applied in the instant case, the statute was violative of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

Jurisdiction is conferred on this Court by Section 237 of the Judicial Code, as amended by Act of Feb. 13, 1925, c. 229, § 1, 43 Stat. 937 (§ 344, Title 28, U. S. C. A.) and Act of February 13, 1925, c. 229, § 8, 43 Stat. 940 (§ 350, Title 28, U. S. C. A.).

III.

Statement of the Case.

There is no dispute as to the facts. The facts are fully set forth in the petition herein. (See page 2.)

IV.

Specification of Errors.

1. The Court of Appeals erred in holding that, for the purposes of a State income tax, such an income tax laid upon rentals from real property is in substance and effect a tax upon the real property itself.

2. The Court of Appeals erred in holding that the imposition of the New York income tax upon a resident, with respect to income derived from rentals of real property situated in another State, was a taking of property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

3. The Court of Appeals erred in applying the principles laid down in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, *same case* 158 U. S. 601, to the instant case. That case involved a decision as to whether a power to

tax existed; here the power to tax is unquestioned; the exercise of a conceded authority is challenged.

4. The Court of Appeals erred in holding that the tax in question was invalid as constituting double taxation.

5. The Court of Appeals erred in holding that § 351 New York Tax Law, as here applied, was violative of the Fourteenth Amendment.

V.

Summary of Argument.

1. The State of New York may legally and constitutionally impose an income tax upon its residents, upon and with respect to their entire statutory net income, from whatever source derived, except instrumentalities of the Federal Government.

2. The State of New York may lay an income tax upon a resident of that State with respect to income derived from rentals of real property situated in another State and such tax does not infringe upon or violate any constitutional right or privilege of the taxpayer.

3. The tax is equitable and justifiable.

VI.

ARGUMENT.

Point I.

The State of New York may legally impose an income tax upon its residents upon and with respect to their entire statutory net income, from whatever source derived.

Section 351 of the Tax Law is entitled "Imposition of income tax" and provides in part:

> "A tax is hereby imposed upon every resident of the State, which tax shall be levied, collected and paid

annually upon and with respect to his entire net income as herein defined, at rates as follows: * * *."

The term "net income" means the gross income of a taxpayer less the deductions provided for in Article 16 of the Tax Law (Tax Law, § 357).

Section 359 of the Tax Law provides that the term "gross income" includes gains, profits and income derived from dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also gains or profit and income derived from any source whatever. It is also provided that the amount of all such items of income shall be included in the gross income for the taxable year in which received by the taxpayer. The New York Income Tax is a general, nondiscriminatory tax on an individual and is not imposed on any particular income. It is imposed "upon every resident of the State" with respect to his entire net income from all sources. (*People ex rel. Central Union Trust Co.* v. *Wendell,* 197 App. Div. 131; affirmed 231 N. Y. 629, no opinion. See also *Clyde* v. *Gilchrist,* 262 U. S. 94.)

The *Central Union Trust* case dealt with the imposition of our income tax upon income derived from mortgage interest. Section 251 of the Tax Law provided that all mortgages of real property on which a recording tax had been paid and the debts and obligations secured thereby, should be exempt from taxation by the State and its instrumentalities. The Court considered the holding in the *Pollock* case, *infra,* and determined that the conclusion in that case did not apply and went further, saying (page 135):

> "There is still another view to take of this question. *The income tax is not directly at least imposed on any particular income.* The recording tax is imposed on the mortgage (§ 253); the income tax is imposed on the individual. It is 'imposed upon every resident of the

> State' (§ 351). His income is used only in fixing the measure of such tax. It is the net income on which the tax is computed (§ 351). The 'net income' means the 'gross income' of the taxpayer less legal deductions (§ 357) and in determining the 'gross income' mortgage interest as well as all other income is included with numerous exceptions specified in section 359. From such 'gross income' thus determined are to be subtracted numerous deductions (§ 360) and also certain exemptions (§ 362) before the tax is computed. *Hence the income from any particular source is but one element to be considered in connection with other elements in determining the measure of the taxation which is imposed on the individual.* In no proper sense may it be said that the tax is imposed on the interest of any particular mortgage. That is merely a factor in the determination of the amount of such taxation." (Italics ours.)

A State income tax generally has been held not a tax on property, or at least is not such a tax as to be included in the constitutional limitations imposed on property taxes.

Cooley on Taxation, Fourth Ed., § 1743.

The tax is justified because of the privileges residents of this State enjoy under the Constitution and laws of the State, and the benefits and protection they receive from the State. Such taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily apportioned to their ability to pay.

Shaffer v. *Carter,* 252 U. S. 37,

In that case this Court said (page 52):

> "And we deem it clear, upon principle as well as authority, that * * * a State may impose general in-

come taxes upon its citizens and residents whose persons are subject to its control. * * *."

And again this Court said (page 57):

"As to residents it (the State) may, and does, exert its taxing power over their income from all sources, *whether within or without the State,* and it accords to them a corresponding privilege of deducting their losses, wherever these accrue." (Italics ours.)

The case of *Maguire* v. *Trefry,* 253 U. S. 12, upheld the imposition of a State income tax upon a resident with respect to income from a trust estate consisting of securities held by a trustee in another state. This Honorable Court quoted, with approval, the following excerpt from the decision in the State Court (p. 14):

"The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference. It is true of the present tax, as was said by Chief Justice Shaw in *Bates* v. *Boston,* 5 Cush. 93, at page 99, 'The assessment does not touch the fund, or control it; nor does it interfere with the trustee in the exercise of his proper duties; nor call

> him, nor hold him, to any accountability. It affects only the income, after it has been paid by the trustee' to the beneficiary."

Opposing counsel argued below that this case was not in point because the tax was upheld under the rule of *mobilia sequuntur personam.* We submit that this Court made a clear distinction between taxation of the corpus of the trust and the income derived therefrom. This is clearly indicated in the later case of *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, where Virginia sought to tax the corpus of a trust, held in Maryland by a trustee for the benefit of a *cestui* domiciled in Virginia. This Court held that Virginia was without jurisdiction to lay such a tax because the *situs* of the corpus was beyond her jurisdiction. This Court said, however (p. 92):

> "The power of Virginia to lay a tax upon the fair value of any interest in the securities actually owned by one of her resident citizens is not now presented for consideration. See *Maguire* v. *Trefry, supra.*"

Is not this the equivalent of saying that a state may lay an income tax upon a resident's income derived from a trust held in another state, despite the fact that the corpus is beyond the taxing power of that state? We submit it is so.

In a recent decision of this Honorable Court, *Lawrence* v. *State Tax Commission,* 286 U. S. 276, Mr. Justice Stone said at page 279:

> "The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equitably among those who enjoy its benefits.

> *Hence domicile in itself establishes a basis for taxation.* Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government." (Italics ours.)

And again at page 280:

> "It is enough, so far as the constitutional power to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship. It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, still, it could not tax the receipt of income upon payment of that same obligation. *We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside the state of the owner are not subject to taxation within it,* or is in any respect so arbitrary or unreasonable as to place it outside the constitutional power of taxation reserved to the state." (Italics ours.)

It is true that the income held taxable in the *Lawrence* case was derived from a business conducted in the foreign jurisdiction; we submit, however, that the fundamental principle is applicable to income derived from a tangible

located in another state. In the Court below, opposing counsel sought to distinguish this case upon the theory that the tax there was sustained because the source of the income was itself taxable. We submit that it is manifest that the decision was based upon very much broader grounds and that this Court's reference to the fact that the obligation from which the income in that case arose was taxable there, was only incidental.

There are numerous decisions upholding an income tax laid upon income derived from property, which itself could not be subjected to a tax.

The Federal Constitution (Const. Art. I, § 9, cl. 5) provides, "No tax or duty shall be laid on articles exported from any State." The net income of a corporation derived from exporting goods from the States and selling them abroad was held subject to the Federal Income Tax as part of its "entire income arising or accruing from all sources."

Peck v. *Lowe*, 247 U. S. 165.

At page 174 this Court said:

> "The tax in question is unlike any of those heretofore condemned. It is not laid on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. *On the contrary, it is an income tax laid generally on net incomes.* And while it cannot be applied to any income which Congress had no power to tax * * * *it is both nominally and actually a general tax.* It is not laid on income from exportation because of its source, or in a discriminatory way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. *The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to*

use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins." (Italics ours.)

The New York Courts have held that the New York Personal Income Tax is not invalid as being a tax imposed upon interstate commerce (U. S. Const. Art. I, § 8, subd. 3), and upon exports (U. S. Const. Art. I, § 9, subd. 5) because the tax is not imposed upon the goods in interstate commerce or in process of exportation, but simply upon the net income of the business.

People ex rel. Stafford v. *Travis,* 231 N. Y. 339.

And it has been held that, although a state may not directly burden interstate commerce by taxation, yet it may, in laying a general income tax upon the gains and profits of a domestic corporation, include in the computation net income derived from transactions in interstate commerce without contravening the commerce clause in the Constitution.

U. S. Glue Co. v. *Oak Creek,* 247 U. S. 321.

POINT II.

The tax here imposed involves no infringement of the taxpayer's constitutional rights.

The entire structure of the taxpayer's contention rests upon the decision of this Court in the case of *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; same case on rehearing, 158 U. S. 601, and it is insisted that this case is directly in point upon the proposition that an income tax upon rentals from real property is identical with a tax on the real property itself; and that, since the State of New York cannot tax real property situated in another state, it

may not impose an income tax upon its own residents with respect to income derived from the rentals of real estate located in another jurisdiction.

The *Pollock* case was a decision arising under the Federal Income Tax Law of 1894. The decision held that income from municipal bonds could not be taxed by the Federal government because it was a tax upon the power of the State and its instrumentalities to borrow money and, consequently, repugnant to the United States Constitution; it further held that a tax upon rents or income from real estate was a direct tax within the meaning of that term as used in the United States Constitution, and hence could not be levied without apportionment among the several states. We submit that the decision did not hold that a tax on income or gains from real estate was *identical* with a tax on the real estate itself. What the Court sought to determine solely was whether an income tax on the income from real property was a direct tax barred by the United States Constitution unless apportioned.

The *Pollock* case merely determined so far as at all relevant here that a Federal income tax laid upon income derived from real property was in the same category as a tax upon the real estate itself considering the matter *solely* from the standpoint of one of two great classifications: namely, direct taxes subject to the rule of apportionment, and duties, excises and imposts subject to the rule of uniformity.

The following quotation, taken from the dissenting opinion in the *Pollock* case, seems pertinent (p. 645):

> "It is said that a tax on the rentals is a tax on the land, as if the act here under consideration imposed an immediate tax on the rentals. This statement, I submit, is a misconception of the issue. The point involved is whether a tax on net income, when such in-

come is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes to the extent to which real estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to direct levy on the land itself? It seems to me that the question when thus accurately stated furnishes its own negative response. Indeed, I do not see how the issue can be stated precisely and logically without making it apparent on its face that the inclusion of rental from real property in income is nothing more than an indirect tax upon the land."

The State of Wisconsin has developed an authoritative body of law bearing upon income tax laws and upon the question of the applicability of the *Pollock* case, we quote from *State ex rel. Bolens* v. *Frear,* 148 Wisconsin, 456, 134 N. W. 673; 135 N. W. 164; certiorari denied 231 U. S. 616:

"Another contention is that the act provides for double taxation, and for both reasons it is claimed that it denies to citizens the 'equal protection of the laws.' It is said in support of this contention that the United States Supreme Court in the Pollock case, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759 has held that taxation of income derived from land is in fact taxation of the land itself, hence that the act provides for double taxation, first of the land in specie, and next of the income therefrom. It seems that this claim may be very easily met. The question in the Pollock case was whether the taxation of rentals of land was direct taxation within the meaning of that term as used in the Constitution of the United States, and it was held to be the same, in substance, as a tax on the land itself, and hence a direct tax. This may be admitted for the purposes of the case, but it does not appear to in any way decide the question here at issue, or even to be very persuasive. The question there was of the power

> of Congress under that clause of the federal Constitution which forbids any direct federal tax, except one levied in proportion to the population. The question here is primarily of the power of the legislature of Wisconsin under its Constitution to levy an income tax in addition to a real estate tax, and, secondarily, whether such a tax denies to any one the equal protection of the laws."

So the question in the instant case concerns only the legal right of the State of New York to subject to its income tax, the net income of one of its residents, in part derived from rentals on real property located elsewhere, when such net income is commingled with and forms part of the taxpayer's entire net income. With the question whether it is a direct or indirect tax we are, of course, not remotely concerned.

And in *State ex Rel. Manitowoc Gas Co.* v. *Wisconsin Tax Commission* (1915), 161 Wis. 111; 152 N. W. 848, the Court said:

> "Even a tax on the income of real estate or of personal property, though declared in *Pollock* v. *Farmers L. & T. Co.*, 158 U. S. 601, to be a direct tax within the meaning of the Federal Constitution, requiring such taxes to be apportioned according to population, is not, when included in an income tax, a direct tax upon property as such. Our income tax is a burden laid upon the recipient of the income whether derived from real estate, personal property or labor, the amount of which is determined by the amount of the total net income derived from these sources, singly or combined. It is a toll taken from the fruits of property and labor in proportion to the net value of the harvest."

The effect of the *Pollock* case has been very much weakened by subsequent decisions of the United States Supreme

Court. Thus, in *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, which was a decision involving the Federal Income Tax Act of 1913, this Court said, in speaking of the decision in the *Pollock* case (p. 16):

> "The court, fully recognizing in the passage which we have previously quoted the all-embracing character of the two great classifications including, on the one hand, direct taxes subject to apportionment, and on the other, excises, duties and imposts subject to uniformity, held the law to be unconstitutional in substance for these reasons: Concluding that the classification of direct was adopted for the purpose of rendering it impossible to burden by taxation accumulations of property, real or personal, except subject to the regulation of apportionment, it was held that the duty existed to fix what was a direct tax in the constitutional sense so as to accomplish this purpose contemplated by the Constitution. (157 U. S. 581.) Coming to consider the validity of the tax from this point of view, *while not questioning at all that in common understanding it was direct merely on income and only indirect on property,* it was held that considering the substance of things it was direct on property in a constitutional sense since to burden an income by a tax was from the point of substance to burden the property from which the income was derived and thus accomplish the very thing which the provision as to apportionment of direct taxes was adopted to prevent. As this conclusion but enforced a regulation as to the mode of exercising power under particular circumstances, it did not in any way dispute the all-embracing taxing authority possessed by Congress, including necessarily therein the power to impose income taxes if only they conformed to the constitutional regulations which were applicable to them. Moreover in addition the conclusion reached in the *Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property,* but on the contrary recog-

> nized the fact that *taxation on income was in its nature an excise* entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it." (Italics ours.)

In a more recent case, *Bromley* v. *McCaughn*, 280 U. S. 124, involving the constitutionality of the Federal Gift Tax, the tax was challenged upon the ground that it was a direct tax upon property and, hence, void, because unapportioned.

This Court held that while taxes levied upon or collected from persons because of their general ownership of property, may be considered as direct, on authority of the *Pollock* case, yet a tax imposed on a particular use of property or on the exercise of a particular incidental to ownership, was an excise which did not need to be apportioned.

After enumerating a series of taxes of a kindred nature which had been upheld, this Court said (p. 137):

> "It is true that in each of these cases the tax was imposed upon the exercise of one of the numerous rights of property, but each is clearly distinguishable from a tax which falls upon the owner *merely because he is owner*, regardless of the use or disposition made of his property."

This Court rejected the argument that a tax upon the keeping or giving of property was no different from a tax on the property itself.

Here the tax is not imposed merely because the taxpayer happens to be the owner of Ohio real estate, but solely because the net income from that property forms a part of her entire net income and, inasmuch as she enjoys the bene-

fits and protection of our laws and our sovereignty, she is called upon to bear a portion of the cost of government, in proportion to her ability to pay.

This is precisely the theory of this Honorable Court in upholding the tax under consideration, in *Peck* v. *Lowe, supra,* 247 U. S. 165, when this Court said (p. 174), that the tax was not laid upon income "because of its source, or in a discriminatory way, but just as it is laid on other income", and that the tax was both nominally and actually a general tax laid upon net income arising or accruing from all sources without discrimination, the source of the income being affected but indirectly and remotely, for the reason that the tax was levied "after the recipient of the income is free to use it as he chooses".

In no wise is the imposition of this tax violative of the Fourteenth Amendment to the Federal Constitution, as urged by the taxpayer in the Court below.

Point III.

The imposition of this tax is equitable and justifiable.

The tax here imposed is laid upon the taxpayer's net income from all sources, generally and without discrimination; hence she is allowed to deduct the necessary expenditures connected with the production of that income. Only that portion of her income derived from the rentals of the Ohio Property which she is able to take to herself here in New York State, and use and enjoy as she chooses, is taxed.

No claim is made that taxpayer has been unable to receive and enjoy the net income here taxed, in this state, where she resides and enjoys the benefits of the sovereignty of New York State. If the taxpayer's contention be correct and if her income were derived, as conceivably it might, entirely from real property located in other states,

she would be entitled to enjoy the benefits and protection of our sovereignty and, while able to make a contribution to the cost of government, would be relieved from so doing.

We perceive a wide distinction between inheritance taxation and income taxation, so far as the effect of so-called multiple taxation is concerned. We refer to this in view of the fact that opposing counsel urged the applicability of the Inheritance Tax cases (*Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83; *Farmers Loan Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *So. Carolina*, 282 U. S. 1; *First National Bank of Boston* v. *Maine*, 284 U. S. 312) in the Court below.

In inheritance taxation, the incidence of the tax arises from the single event of death. Yet, by the exercise of a truly arbitrary power, successions or transfers were formerly subjected to a multiplicity of taxes by various taxing jurisdictions, frequently without a semblance of a compensatory benefit to the taxpayer.

Not so with an income tax. There the incidence of the tax is coupled with a direct and compensatory benefit to the individual called upon to bear the tax, either in his person or in his property. If the taxpayer voluntarily chooses to reside in one state and conduct a business or own property in another, he should not complain if each state exacts an income tax, proportioned to the taxpayer's economic ability to respond to the costs of government in those states, the benefits of whose laws he invokes and accepts, either in his person or in his property.

In the instant case, the taxpayer chooses to reside in New York and enjoy here the fruits of property which she owns in Ohio. She has no justifiable complaint because New York and Ohio each ask her to contribute to the costs of government, since New York protects her in her person, and Ohio lends its protection to her property.

The tax is an integral part of an entire taxing scheme, considered necessary for satisfying the needs of the State for revenue. A measure may be valid as a necessary adjunct to something which clearly lies within the legislative power, even though, standing alone, its constitutionality might be subject to doubt.

Purity Extract Co. v. *Lynch*, 226 U. S. 192;
Ruppert v. *Caffey*, 251 U. S. 264;
Everards Breweries v. *Day*, 265 U. S. 545;
Taft v. *Bowers*, 278 U. S. 470, 482.

Conclusion.

Petitioner, therefore, submits that this is a proper case for the issuance of a writ of certiorari.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney General of the State of New York,
HENRY EPSTEIN,
Solicitor General of the State of New York,
Counsel for Petitioners.
JOSEPH M. MESNIG,
Assistant Attorney-General of
the State of New York,
Of Counsel.

APPENDIX A.

"§ 351. Imposition of income tax. A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars, but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, and for any taxable year ending during the year nineteen hundred and nineteen."